United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7022

To be argued by
RAYMOND C. GREEN

United States Court of Appeals
FOR THE SECOND CIRCUIT

JOHN H. MARCHESE,
Plaintiff-Appellant,

against

MOORE-McCORMACK LINES, INC.,
Defendant and Third-Party Plaintiff-Appellee,

against

COURT CARPENTRY & MARINE CONTRACTOR CO., INC.,
Third-Party Defendant-Appellee.

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THIRD-PARTY DEFENDANT-APPELLEE COURT CARPENTRY & MARINE CONTRACTOR CO., INC.

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Statement

Plaintiff, a lasher employed by third-party defendant-appellee Court Carpentry & Marine Contractor Co., Inc. (hereinafter the employer), sued defendant-third-party plaintiff-appellee Moore-McCormack Lines, Inc. (hereinafter the shipowner) seeking to recover damages for personal injuries sustained while at work aboard shipowner's vessel, the S.S. Mormacglen; and the shipowner impleaded the employer and Universal Terminal & Stevedoring Corp., the stevedoring contractor, asking indemnity.

The parties stipulated to try the case before Magistrate Vincent A. Catoggio, sitting as a master pursuant to Rule 53 F.R.C.P. (2a-3a). At the trial's outset all claims against or by Universal Terminal & Stevedoring Corp. were discontinued, and thereafter only the issues of liability were tried (2a-5a).

After hearing all of the evidence, which came exclusively from live witnesses (6a-157a), and plaintiff's oral arguments (159a-162a), and studying the minutes and briefs of the parties (152a, 162a), the Magistrate on September 24, 1974 filed a detailed report as to his findings of fact and conclusions of law, the bottom-line conclusion of which was that the complaint and third-party complaint be dismissed (iii-xiv). Plaintiff filed objections to the report; the shipowner and employer moved to confirm it; and plaintiff cross-moved to confirm it in part and reject it in part.* The motions were heard before Judge Anthony J. Travia, who granted the shipowner's (and the employer's) motion(s) and denied plaintiff's cross motion. On November 6, 1974 Judge Travia filed an order which confirmed the report and directed dismissal of plaintiff's complaint and the third-party complaint (xiv-xv). On November 7, 1974 judgment was entered in accordance with Judge Travia's order (xvi). Plaintiff appeals from the judgment (xvii).

The Evidence and the Facts—Prefatory Note

Plaintiff's brief first does not fully and fairly state the raw evidence which he mischaracterizes as "facts"; and when dealing with the Magistrate's findings and determinations which are the facts, he proceeds to totally ignore

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* Neither plaintiff's objections nor any of the motion papers are printed as part of plaintiff's appendix.

both salient factual findings* and the evidentiary underpinning for those findings he quarrels with. Plaintiff would have it that the facts are his carefully selected portions of the evidence restrictedly read in a manner most favorable to his position. He forgets that the burden of proof was his; coupling his forgetfulness with a refusal to accept the principle that the fact-finding role was the Magistrate's, and not his.

Analysis of the Evidence

On August 17, 1970 Moore-McCormack's vessel, the Mormacglen, was docked at the 23rd Street Terminal in Brooklyn, New York to discharge cargo.

Among this cargo was a deck cargo put aboard in Brazil which consisted of 4 20′ long by 3′-4½′ diameter pipes running fore and aft in the main deck passageway on the inshore side of number 5 hatch (5a, 16a-17a). The pipes were in pyramid form. Three of them rested either directly on the deck or on wooden sleepers placed athwartship and the fourth was nested atop the first two nearest the coaming in the channel formed by the meeting of their sides (5a, 16a-17a, 39a, 44a-47a, 107a-108a). They lay in a manner similar to Exhibit 1 (15a).

There was a 1-1½′ of space between the hatch coaming and the pipe nearest to it, and a like space between the ship's rail or bulwark and the pipe nearest it (16a-17a, 55a). The rail had stiffeners at regular intervals, and the passageway deck was, of course, inclined downward toward the rail.

The pipes arrived staunchly secured by three separate and single wire lashings. Each lashing ran athwartship over the pipe pyramid from its railing side to its coaming side. The lashings were accordingly at right angles with

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* E.g. There is not a single mention of the word "turnbuckle" in the entirety of plaintiff's brief.

the lengths of the pipes. One lashing ran across the middle of the pipe pyramid ran about 10′ from either of its ends, and the other two ran across the pyramid about 3′ in from either end (17a, 24a, 63a, 70a, 101a-102a).

On its rail side each lashing began with one eye of an 18″ turnbuckle attached to a pad-eye. The wire for such lashing was fastened to the other eye of its turnbuckle by being passed through such eye and brought back and clamped to itself by two clips, each of which had two 6″-8″ screws. As previously stated each wire then ran over the top of the pipe pyramid and was fastened on the coaming side in some fashion not spelled out in plaintiff's proofs (69a-70a, 95a-96a, 110a-111a).

The pipe cargo remained firmly lashed, safe and secure throughout the voyage from Brazil, and it so remained until the moment plaintiff (or his fellow employee, Anderson*) undid the last remaining lashing (71-72, 91, 96-97).

But, to return to the chronology. At 8:00 A.M. plaintiff and his fellow employees went to work aboard the vessel; and at 9:00 A.M. his snapper told him to unlash the pipes (14-15). At the trial plaintiff and Anderson said the snapper separately told them to do the unlashing quickly (16a, 31a-33a, 48a-56a, 84a, 111a).

At his November 9, 1972 deposition (4), the transcript of which was in no way corrected or changed thereafter, plaintiff's testimony was otherwise.

He at that time said (49-50):

> "Question: Had you been given any specific orders to do the work which you were doing when the accident happened?
>
> Answer: Yes."

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* If one is to ignore both the Magistrate's finding that plaintiff undid it; and plaintiff's different in time and place theories and versions on the subject (6-11, 35-36, 39-43, 83).

"Question: First, tell me what the orders were and by whom they were given to you?

Answer: Unlash the pipes in number 5 and it was by my snapper."

Plaintiff, who at the time was experienced both as a lasher and a marine carpenter (21a, 56a-58a), instead of loosening the lashings by unscrewing the turnbuckles, an action which he and his witnesses were compelled to admit would allow for the very gradual and safe settling and spreading of the pipe until arrested by the rail stiffeners on the one side and the coaming on the other (52a-55a, 74a, 116a-117a, 157a), chose instead to flirt with danger. He unlashed by unscrewing the clips' nuts. The inevitable of course happened. After he had completely unlashed the forward and middle lashing wires and had removed the first clip of the final wire and was in the process of removing either the first or second nut from the last clip (the last and only thing remaining to keep the pipes together) the pressure of the top pipe on the ones below and their own weights forced their sudden spread, pinning him to the rail (17a-19a, 25a-29a, 33a, 65a-68a, 71a-74a, 84a-88a, 89a, 96a-102a).

Realizing the plain fact that the accident was solely due to his own fault in not unlashing by means of the turnbuckles, plaintiff attempts to convert his snapper's instruction to unlash quickly into both an order not to use the proper and safe way, i.e. the turnbuckle way, and an excuse for not using it. His implied* argument in this regard is baseless.

First, an instruction to do a job quickly is reasonably to be interpreted to mean proceed to it without delay and without loafing in the doing of it; not by any stretch of

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*"Implied" because plaintiff's brief seeks to make the turnbuckle a non-thing by refusal to refer to it.

the imagination to do it in an unsafe way (31a). And, there is, moreover, certainly nothing in the proofs to suggest that the snapper directed that the job be done in the way plaintiff did it. Second, the proofs themselves demonstrated that plaintiff's way of doing the job would not have been doing it with any appreciably greater quickness than it could have been done properly. Removing a single lashing by unscrewing its clips' nuts involves fully unscrewing nuts from 4 6″-8″ screws, i.e. unscrewing a total length of 24″-32″.* To unscrew the 36″ of thread on an 18″ turnbuckle so that the pipes would spread out slowly and safely into the 1′-1½′ wide space on either side of the stow would involve unscrewing a length of 24″-36″ (52a-55a, 113a, 122a). And, when pressed as to the difference in time, if any, between the two ways Anderson at first would not even answer and then said the difference would be five minutes (112a, 122a).

Further, plaintiff says that the pipes should have been chocked and he did not know they were not chocked because he didn't take the trouble to look; and he on this basis claims the ship and not he is to blame for his accident (24a, 37a, 61a-62a, 78a-79a, 107a-108a).

This was another bit of absurdity. First, he himself testified that when he carpentered or lashed a similar type of cargo it was sometimes chocked and sometimes not chocked (33a-34a, 59a-60a). Anderson, his witness, said he too would not have bothered to see if the pipes had been chocked before he proceeded to remove lashings, and he would have unlashed by removing the clips even if he knew they were not chocked; but upon reflection he corrected himself to say that if he knew he would not have proceeded that way, but would have brought the condition to his foreman's attention (108a-109a, 116a-120a).

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* There are 2 clips per lashing and 2 screws per clip.

Next, plaintiff's "expert witness" testified that chocking means laying sleepers parallel to the pipes, nailing uprights (stanchions) rising to a height of 1′ above the top of the outer pipe to the sleepers, and angling braces and cross braces to the uprights (138a-148a, 153a). The absence of such a framework would of course been open and visible to anyone. Moreover, says the expert, if he were plaintiff he would have examined to see if there were wedges propping the pipes before he undertook to remove the lashings (144a-145a).

By commenting upon the "expert" witness' testimony in this regard we do not for one moment suggest that the pipes should have been chocked at accident time. The cargo was at the time safe for handling if the unlashing were properly done by use of the turnbuckle. If one were to say that lashing should be removed first and then the wooden structure of the sort described by the "expert" next be removed, the men who would later be removing the sleepers, stanchions, braces, etc. would indeed be placed in a position of peril. And, it was clear that the expert was blantantly fictionalizing when he said that wooden structures of the sort he described should have, with safety to the men participating in it, remained standing during an unloading operation (155a). How much danger would he have a Court believe that others should expose themselves to, in his endeavor to justify plaintiff's use of an unsafe way of doing his job when he had a perfectly safe alternative?

Finally, plaintiff sought to excuse his actions by saying the blame was Anderson's in removing a clip on the coaming side (94a-97a, 161a). But, even if true this would not justify a recovery by plaintiff since the negligent act of a fellow employee does not render a ship unseaworthy; and furthermore, plaintiff would then have had no reason whatsoever for being where he was, and was again alone clearly to blame for his own accident (102a-104a).

Facts

The Magistrate's essential findings were that there was nothing wrong or dangerous or unseaworthy about the way the pipe cargo was situated with respect to an experienced lasher-carpenter whose job it was to unlash it; and that after plaintiff was told by his snapper to unlash the pipes, and work quickly because the longshoreman gang were standing by ready to unload, plaintiff went to the pipes and without looking to see whether or not the pipes were chocked, as he should have done, plaintiff positioned himself between the pipes and the rail and proceeded to unfasten the lashing by unscrewing the clips, an unsafe way but a faster one, rather than unscrewing the turnbuckle, a slower way but a safe one, with the accident event as the inevitable result when plaintiff unscrewed a nut on the last clip of the last lashing.

In items 21 and 22 of his findings and 1 and 2 of his conclusions (x-xii), the Magistrate then went on to make additional pinpoint findings firmly founded on the evidence that there was no condition of danger or unseaworthiness and plaintiff's derelict actions and inactions were the sole cause of the occurrence; and furthermore that it was plaintiff and not Anderson who did the unscrewing of the nut which caused the pipes to spread, roll and pin him.

Said items said:

"FINDINGS OF FACT

* * *

21. The pipes rolled and pinned the plaintiff because he had released the wire lashing without determining whether the pipes were chocked.

22. The plaintiff in oral argument has contended that at most he can be charged with contributory negligence and that the ship was unseaworthy since the manner in which the pipes were stowed did not permit

the plaintiff to perform his unlashing work in safety. He further suggests that his co-worker Alfonse Anderson who was working to release the third of the three wire lashings when the pipes moved and pinned plaintiff against the rail, was the one who rendered the ship unseaworthy. All of the plaintiff's arguments fail and I find that until the plaintiff himself released a wire or wires holding the pipes in position there was no danger to the plaintiff. In releasing the wire lashings the plaintiff should have realized that he was releasing a force which he had to control if he was to avoid injury. If plaintiff had unscrewed the turnbuckle it would have released the tension gradually. Instead, plaintiff did the work in a way that the tension was released suddenly. When two wires were released, all the tension was put on the third wire and plaintiff set to work to release this tension with suddenness while he was in the only location where he could get hurt—between the rail and the pipes. The plaintiff did not fulfill his duty to perform his work under all of the existing circumstances with reasonable care but instead he positioned himself in an unsafe place and this coupled with the way he performed his work brought about the injuries of which he makes complaint herein.

CONCLUSIONS

1. The plaintiff's reckless disregard for his own safety, the manner in which he did his work and the place where he positioned himself, were the sole causes of his injury.

2. The ship was not rendered unseaworthy by any condition on her deck or by any act of plaintiff's fellow employees."

Although these key paragraphs give a clear and panoramic factual overview of what happened, plaintiff chal-

lenges them "as a combination of alleged facts, legal arguments, legal inferences, and legal conclusions which will be dealt with in turn" (plaintiff's brief p. 12). Plaintiff in turn dealing with them (plaintiff's brief pp. 12-14) turns out to be a complaint that the Magistrate did not adopt plaintiff's distorted and truncated version of the facts.

POINT I

Since the findings of fact are well supported by the evidence and the conclusions of law are well founded upon applicable principles of law the judgment should be affirmed.

Thumbnailed, the findings of fact and conclusions of law were that:

There was certainly nothing wrong with the easily visible way the cargo was secured, and there was no danger from it before plaintiff undertook to unlash it in an unsafe manner of his own choosing.

One can convert the safest of conditions or tasks into a hazard by going about his work in an indifferent or negligent manner. That is exactly what plaintiff did here, and he may not by promiscuous use of the words unseaworthiness or negligence lay the blame for his accident on the shipowner.

It needs no citations beyond Rule 53(e)(2) itself to demonstrate that Magistrate Catoggio's findings of fact would be conclusive even if merely not "clearly erroneous." Here, the evidence and its reasonable inferences do not merely allow the findings, they compel them. The conclusions of law are also mandated.

The mere happening of an accident does not establish unseaworthiness, and in order to recover an injured longshoreman (or lasher) has the burden of proving unsea-

worthiness. Plaintiff has not made out a case, let alone carried his burden of proof (*Logan* v. *Empresa Lineas Maritimas Argentinas*, 353 F. 2d 373).

That plaintiff, an experienced lasher and carpenter heedless to his surrounding and without bothering to look how the cargo was secured chose to do his task in an unsafe way (unscrewing the clips) instead of a safe way (unscrewing the turnbuckle) does not make for unseaworthiness of the vessel and consequent liability on the part of the shipowner. Where a longshoreman (lasher) has a safe way of doing a job and chooses instead to do it in an unsafe way, the vessel's owner may not be charged with a negligence or an unseaworthiness liability (*Baker* v. *S/S Cristobal*, 488 F.2d 331; *Peymann* v. *Perini Corporation*, 507 F.2d 1318; *Berke* v. *Lehigh Marine Disposal Corp.*, 435 F.2d 1073, cert. den. 404 U.S. 825).

Moreover, even if unseaworthiness could be said to have existed, it was caused 100% by plaintiff's own fault, and he, accordingly, has no basis for recovery against the shipowner (*Pisano* v. *S.S. Benny Skou*, 346 F.2d 993; *Donovan* v. *Esso Shipping Company*, 259 F.2d 65; *Reinhart* v. *United States*, 457 F.2d 151; *Moore* v. *United States*, 347 F. Supp. 38; *Theodories* v. *Hercules Navigation Co.*, 448 F.2d 701; *DeBose* v. *MS Loppersum*, 438 F.2d 642; *Caillouet* v. *Lykes Bros. Steamship Co.*, 431 F.2d 707; *Boudreaux* v. *Sea Drilling Corporation*, 427 F.2d 1160; *Sotell* v. *Maritime Overseas, Inc.*, 474 F.2d 794).

Furthermore, even if one were to assume contrary to the findings that it was Anderson's negligence rather than plaintiff's in unscrewing the clip, there still would not exist any basis for shipowner liability. The operational negligence of a fellow employee does not make for unseaworthiness (*Usner* v. *Luckenbach Overseas Corp.*, 400 U.S. 494; 91 S. Ct. 514; *Caparro* v. *Koninklijke Nederlandsche Stoomboot M., N.V.* (2 Cir.) 503 F.2d 1053; *La Fleur* v. *M.S. Maule*, 349 F.Supp. 1318, affd. 467 F.2d 944; *McDonald*

v. *Lorentzen*, 486 F.2d 613; *Smith* v. *Olsen & Ugelstad*, 459 F.2d 915).

Additionally, if Anderson was unloosening the clip there would not have been any earthly reason for plaintiff to have been in the position of danger where he placed himself, and this would be another reason for absence of any duty or liability to him under the circumstances (*Gouldman* v. *Southern Stevedoring Co. of Texas, Inc.*, 496 F.2d 91; *DeBose* v. *MS Loppersum, supra*).

Thus, no matter how viewed the result below was not merely justified, it was compelled; and plaintiff must be content with the remedy and recovery he is fortunate to have provided for him by the Longshoremen's and Harbor Workers' Compensation Act.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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T CARPENTRY & MARINE CONTRACTOR CO., INC.,

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the age of 18 years, is not a party to the action, and resides
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